No. 14188

In the

United States Court of Appeals

For the Ninth Circuit

BART McKENNEY and MARIE McKENNEY, individually and as co-partners doing business under the name of McKenney Logging Company, *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

EINAR GLASER, DOROTHY GLASER and McKENNEY LOGGING CORPORATION, a corporation, *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

APPELLEE'S BRIEF

in Answer to Brief of Appellant
McKenney Logging Corporation

Appeals from the United States District Court
for the District of Oregon

HONORABLE JAMES ALGER FEE, Chief Judge

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JURISDICTION

This is a suit in equity for injunctive relief and incidental damages brought in the United States District Court for the District of Oregon by appellee Buffelen Manufacturing Co. (hereafter called "Buffelen"), a California corporation, against Edward M. Buol, a citizen of Washington, appellant McKenney Logging Cor-

poration, a Washington corporation (hereafter called "the corporation"), J. B. Carr, a citizen of Oregon, and appellants Bart and Marie McKenney and Einar and Dorothy Glaser, citizens of Oregon. The amount in controversy exclusive of interest and costs exceeds $3,000.00 (Tr., pp. 10-11, 86).

Said appellants have appealed from the final Judgment and Decree of that Court (Tr., pp. 95-96, 107-108, 115-116).

The District Court acquired jurisdiction under 62 Stat. 930, 28 U.S.C.A. §1332. This Court acquired jurisdiction under 62 Stat. 929, 28 U.S.C.A. §1291.

APPELLEE'S STATEMENT OF THE CASE

The statement which follows is supplemented by the statements contained in appellee's briefs in answer to the briefs of appellants McKenney (at pp. 4-5) and Glaser (at pp. 5-18).

On January 8, 1948 Buffelen Lumber & Manufacturing Company and appellant partners (McKenney and Glaser) entered into a written contract which is set forth in the transcript at pp. 125-146. It provided that the partners should log certain timber described in the contract (Tr., pp. 133, 142-146). Buffelen owned part of the timber, and the partners owned or had log-

ging rights over the remainder (Tr., pp. 126-127, 142-146). It further provided that Buffelen should have an option on the partners' total output (Tr., p. 134).

A Supplemental Agreement relating to other lands subsequently bought by the partners was entered into between the same parties on May 10, 1948. It is set forth in the transcript at pp. 146-150.

All right and interest of Buffelen Lumber & Manufacturing Company under said contracts was assigned to appellee Buffelen Manufacturing Co. with the consent of the partners on June 30, 1948 (Tr., pp. 151- 153, 164-171).

Pursuant to the contract (a) appellee completed a sawmill at Batterson, Oregon at a cost of $150,000.00 which commenced operation in March, 1948; (b) appellant partners logged timber from the lands described in the contract; and (c) between January 8, 1948 and September 1, 1951 appellee purchased 55,546,171 feet of logs produced by said appellants for $2,490,991.88 (Tr., pp. 11, 391).

The contract of January 8, 1948 specifically provided that the partners would not

> "* * * assign this contract nor * * * sell or convey any of the lands or timber contract rights or logging road rights owned by the Loggers in the area covered by this contract except with the written

consent of the Lumber Company." (Tr., pp. 134-135)

In the late spring of 1951, appellant partners considered selling their operations and holdings in Tillamook County to Portland Manufacturing Company. The proposed sale collapsed when Buffelen would not sell its mill or give its consent (Tr., pp. 12, 294-298, 365-367, 450-455; Exh. 51).

On or about August 31, 1951, without notice to appellee, appellants McKenney and Glaser attempted to sell, assign and transfer their operations, holdings and interests in Tillamook County, Oregon, including the timber land and cutting rights described in the contract of January 8, 1948 (a large part of which then stood and still stand of record in Buffelen's name) to appellant McKenney Logging Corporation (Tr., p. 12). Appellants McKenney and Glaser admitted that neither of them advised appellee of the proposed sale (Tr., pp. 303, 175-176, 173-174). Appellee first acquired knowledge thereof at Tacoma, Washington, on September 27, 1951 when Messrs. Buol and Carr, principal officers of the corporation, called on Messrs. Holm and Pohlmann, appellee's Vice-President and raw material buyer, respectively, and advised them of the sale (Tr., pp. 258, 372-373).

The contract of January 8, 1948 also provided that the loggers should

> "* * * give to the Lumber Company at all times the first right and option to purchase the entire output of the Loggers at the market price or the mill pond price as herein provided." (Tr., p. 134)

Raft 44M was scaled August 15, 1951. Appellants McKenney and Glaser failed to give plaintiff the option to buy this raft. The scale sheets were received by appellee on August 20, 1951. No invoice on this raft was ever received (Tr., pp. 319-320). It was inspected by Mr. Gansberg, an employee of appellee, on August 23, 1951, and Mr. Holm informed appellant Glaser on August 24, 1951 that plaintiff wished to purchase it. Mr. Glaser then advised Mr. Holm that the raft had already been sold to others. *Mr. Holm then advised him that Buffelen wanted all peeler logs until further notice.* Raft 44M was the first which contained green peelers from the Yellow Fir Timber, which then stood and now stands of record in Tillamook County, Oregon in Buffelen's name (Tr., pp. 182-185, 307, 313, 319-320; Exh. 12).

Buffelen also instructed appellant McKenney on Sepember 21, 1951 to dump saw logs in the Batterson pond so that the mill (which had been temporarily shut down on June 29, 1951) could resume operation (Tr., pp. 250, 304).

Appellants thereafter refused to let appellee purchase Raft 46M, for which it tendered its check in full payment on October 3, 1951 (Tr., pp. 154-156, 259-270, 306). This tender was made to the partners after Buffelen had received knowledge of the attempted sale at Tacoma on September 27, 1951, at which meeting it had demanded Raft 46M and instructed Buol and Carr to deliver logs at Batterson (Tr., pp. 229, 259-260, 339, 376). Mr. Harry Reed, then employed by appellant McKenney Logging Corporation and formerly an employee of the partners, received the tender for Raft 46M and dictated the letter dated October 9, 1951 rejecting the tender and returning appellee's check. The letter was signed by defendant McKenney (Tr., pp. 277, 305, 364). McKenney Logging Corporation had not then sold said raft to any one else. It was not disposed of until October 22, 1951 (Tr., pp. 358-359).

Tracy Griffin, a Seattle, Washington lawyer who organized and represented McKenney Logging Corporation (Tr., pp. 383-384, 501) examined the deeds, contracts and cutting rights that defendants McKenney and Glaser purported to own or control (which included the land standing of record in appellee's name) prior to the attempted sale or conveyance of August 31, 1951 (Tr., pp. 272, 510).

Harry Reed, a principal employee of the partners, had full knowledge of the contract of January 8, 1948 at all times prior to August 31, 1951, and was familiar with the option contained therein in Buffelen's favor. When the attempted sale was made on August 31, 1951, Mr. Reed immediately assumed a similar position with McKenney Logging Corporation, and he still held that position at the time of the original trial (Tr., pp. 277, 364).

In September and October, 1951 logging contractors Healy and Magnuson operated a logging show for appellant corporation in Section 6, Township 2 North, Range 7 West and in Section 12, Township 2 North, Range 8 West of the Willamette Meridian, which tracts then stood and now stand of record in Buffelen's name (Tr., pp. 512-513, 161-162, 222-223). Two million feet of green and burned timber were removed therefrom during that period, the stumpage value of which was $25.00 per thousand (Tr., pp. 512-513, 223).

Appellee had requested river delivery of all saw logs on May 22, 1951 (Tr., pp. 180-181, 206, 213, 251, 309-310) and had bought all saws logs thereafter (Tr., pp. 186-187), even after it temporarily closed the Batterson mill on June 9, 1951 (Tr., pp. 12, 480) as permitted by the contract (Tr., pp. 138, 190-191). Appellant McKenney was advised by Mr. Holm on September 21,

1951 (before appellee knew of the purported sale) that the Batterson mill would reopen October 1, 1951, and he was instructed to dump logs in the pond at Batterson so that the mill could start operating (Tr., pp. 250, 304). When defendants Buol and Carr advised Buffelen of the purported sale to appellant corporation on September 27, 1951 they were instructed to start dumping logs in the pond at Batterson (Tr., pp. 229, 259-260, 339, 376). They promised to do so at once (Tr., pp. 229; Gl. Br., p. 60). On November 3, 1951, November 23, 1951 and December 24, 1951 the corporation was instructed to dump all logs in the Batterson pond (Tr., pp. 242-244). No logs were dumped in the pond at Batterson by either the partners or the corporation, and the Batterson mill, which had reopened in October, 1951 under the management of Roy Gould, was finally closed down in late November, 1951 (Tr., pp. 220-222, 227, 231-233, 234).

The corporation claimed to have taken the timber free of Buffelen's rights (Tr., p. 382), and Buffelen was thereafter refused the rights to buy logs unless it undertook to buy all that might be produced (Tr., pp. 262, 341-344, 347).

When the mill reopened on October 1, 1951 it was operated by Roy Gould, who was considering the purchase of the mill for $250,000.00 (Tr., pp. 219, 237). Buol and Carr were informed in Tacoma on September

28, 1951 that Mr. Gould would be operating the mill, but that Buffelen would continue to be the purchaser of the logs. No sale had yet been made (Tr., pp. 230, 254-256, 372-376). Buffelen would have retained an interest in the contract in the event of a sale by reason of its agreement with Mr. Gould to buy all shop lumber produced at the mill (Tr., pp. 253, 255-256, 375). Mr. Gould's operation was handicapped by lack of logs and he lost money because no other logs were available. He ceased operations in late November, 1951 after sustaining substantial losses (Tr., pp. 221-222, 226-227). He never bought the mill (Tr., p. 230).

It was contemplated that all parties would consent to any sale which might be made to Mr. Gould (Tr., pp. 383-384; Gl. Br., p. 61).

In the operation of the Batterson mill, appellee realized an average monthly profit of $9,000.00 during fiscal year July, 1949 to June, 1950 and $6,000.00 during fiscal year July, 1950 to June, 1951. Between December 1, 1951 and October 31, 1952 it sustained operating losses in the amount of $30,533.00 (without considering profits it would have earned had logs been delivered as required by the contract) in its attempted operation of the Batterson mill, although the market price of lumber was constant and strenuous efforts to secure an alternative log supply were made by Buffelen's employees

(Exhs. 19a, 19b, 19c, Appendix to McK. Br., pp. 47-52; Tr., pp. 221, 462-475, 480).

QUESTIONS PRESENTED

The following points are presented and argued by the corporation in its brief:

1. Is McKenney Logging Corporation liable for damages suffered by Buffelen in the operation of its mill at Batterson, Oregon after December 1, 1951? (Points I and III, Corp. Br., pp. 2-16, 23)

2. Did the court properly enter judgment against the corporation for treble the value of timber removed by it from Buffelen's land? (Point II, Corp. Br., pp. 16-22).

3. Does the evidence support the judgment for damages suffered by reason of the failure to deliver logs at Batterson? (Points IV, V and VI, Corp. Br., pp. 24-34).

ARGUMENT

I.

The trial court properly held the corporation liable for damages sustained by Buffelen in the operation of its mill at Batterson, Oregon after December 1, 1951 (Appellant's Points I and III).

SUMMARY

A. The facts.

B. The corporation is liable in tort for having schemed to effect a breach of the contract of January 8, 1948.

C. Erroneous assertions by appellant corporation.

D. There was abundant evidence of damage.

A. The facts.

The record shows conclusively that this is not a mere case of business competition in which one party to a transaction knows that the other party has made a prior and inconsistent contract. Appellant corporation denies liability solely on the theory that mere knowledge of the prior inconsistent contract is insufficient to render it liable for wrongfully interfering with that contract.

The trial court found as follows (Tr., pp. 88-89):

"X.

"Defendant McKenney Logging Corporation cut and removed over 2,000,000 feet of timber from plaintiff's land after September 1, 1951, of the value of $25.00 per thousand board feet and plaintiff sustained $50,000.00 damages by reason thereof.

"XI.

"Defendant McKenney Logging Corporation had knowledge of the contract, which is Plaintiff's Exhibit 1, prior to September 1, 1951, and its acts in cutting and removing timber from plaintiff's land were wilful and intentional.

* * * * * * *

"XIII.

"Plaintiff sustained damages in the amount of $118,000.00 by reason of McKenney Logging Corporation's interference with and inducing defendants McKenney and Glaser to breach the contract which is Plaintiff's Exhibit 1.

"XIV.

"Defendant McKenney Logging Corporation refused to tender to plaintiff for purchase all logs removed by it from the lands and rights covered by the contract which is Plaintiff's Exhibit 1."

For reasons discussed elsewhere (Br. Ans. Br. Gl., pp. 19-20), these findings are entitled to great weight.

The court concluded (Tr., p. 93):

"XII.

"Defendant McKenney Logging Corporation is liable to plaintiff for treble or three times the damages sustained by it and specified in Finding of Fact X in the total amount of $150,000.00 for intention-

ally trespassing upon plaintiff's land and wilfully and intentionally cutting timber therefrom and for $118,000.00 damages as specified in Finding of Fact XIII, for interfering with the contract, which is Plaintiff's Exhibit 1, between plaintiff and defendants McKenney and Glaser and for inducing a breach thereof."

The timber was listed by appellants McKenney and Glaser with Mr. Errion during the negotiations regarding the proposed sale to the Portland Manufacturing Company (Tr., pp. 441-443). The transaction between the partners and Messrs. Buol and Carr was originally designed to be a straight commission sale, and Mr. Matott and Mr. Errion were to share in the brokers' commission. However, it was thereafter agreed that Matott and Errion should share equally in the unissued stock of the proposed corporation following the conclusion of whatever litigation might result (Tr., pp. 406-407).

The evidence offered at the retrial established that E. R. Errion, who promoted this transaction, and defendants Buol and Carr, who are respectively the President (Tr., p. 326) and Secretary (Tr., p. 346) of appellant corporation, not only knew of the existence of the Buffelen contract, *but schemed with Mr. Errion and the partners to commit a fraud on Buffelen by agreeing to misstate the facts in an effort to destroy Buffelen's rights in the timber.* (See Br. Ans. Br. Gl., pp. 15-18).

At meetings attended by Mr. Errion, Mr. Carr and Mr. William J. Prendergast, formerly the attorney for the partners and the corporation in this lawsuit, it was concluded that the contract could be successfully avoided if the purchaser denied any knowledge of it. Mr. Prendergast advised that only in this manner could Buffelen's rights be destroyed (Tr., pp. 395-396, 404, 416-418, 431).

At that time, the supposed purchaser was Mr. Buol (Tr., p. 405). Thereafter, Mr. Buol and Mr. Carr organized the corporation and they both became principal officers thereof (Tr., pp. 326, 405, 406, 501, 504-505). They have at all times denied any knowledge of the contract prior to August 31, 1951 (Tr., pp. 336-337, 350, 355, 484-499, 499-511). However, their testimony was overwhelmingly rebutted by the other testimony in the case, and it was disbelieved by the trial judge.

There was, therefore, much more than mere knowledge. There was a concerted plan to falsify the facts and thereby free the timber from the contract and devote it to the purposes of the corporation.

B. The corporation is liable for damages incurred by reason of the said interference with the contract of January 8, 1948.

The tort of unlawful interference with a contract is committed where the contracting party and a third person have schemed to break the contract and destroy the plaintiff's property therein. In *Motley, Green & Co. vs. Detroit Steel & Spring Co.*, 161 Fed. 389 (C.C. N.Y. 1908) plaintiff was a local distributor for defendant Detroit Steel and had incurred great expense in preparing to execute its contract. The officers of said defendant then organized a second corporation, Railroad Steel, to which a pretended sale of Detroit's business and assets was made. Sales were thereafter made by the second corporation. The plaintiff alleged that there was, in fact, a conspiracy between the companies to destroy its contract and that as a result Detroit breached the contract and plaintiff lost commissions. The court held that the complaint set forth a single cause of action against both companies,

> "* * * for a wrongful act which they conspired to perpetrate, and which the complaint alleges they did perpetrate, acting together to a common end; their joint acts resulting in damage to the complainant. * * *" (At p. 394)

In such cases, the court said, *it is irrelevant that the third person did not seek the breach. On the contrary, both the contracting party and the third person are equally liable for the resulting damage* (at pp. 395-396).

In *Mahoney vs. Roberts*, 86 Ark. 130, 110 S. W. 225 (1908) a partnership was dissolved, and one partner agreed not to reenter the same business in the area. Thereafter the withdrawing partner organized a competing business with his wife and step-son in the name of the latter. The court said:

> "The evidence * * * was sufficient to sustain the jury in finding that the assistance given to J. Mahoney by his co-defendants was for the purpose of inducing and did induce him to violate his agreement * * * The evidence was also sufficient to sustain the jury in finding that the assistance was rendered with the intent to injure appellee (they participating in the evil intent of J. Mahoney), *or for the purpose of obtaining some benefit for themselves at the appellee's expense*, or both, to his injury. In such case they were g u i l t y of an actionable wrong, a tort, and were liable for damages." (Emphasis supplied.) (At p. 139)

In *Garst vs. Charles*, 187 Mass. 144, 72 N.E. 839 (1905) the defendant agreed with a retail druggist that the latter should order goods from the plaintiff which had a fixed resale price, that these goods should then be sold to him at the wholesale price in violation of the resale contract, and that he would then sell them at cut-rate prices. The court said:

> "A conspiracy to deprive one of the benefits of a contract with another is unlawful. * * * The defendant's arrangement with Bickford that he should break the contract was a wrong upon the plaintiff,

intended for the defendant's advantage. The scheme was fraudulent." (At p. 149)

In *Lien vs. Northwestern Engineering Co.*, 73 S.D. 84, 39 N.W.2d 483 (1949) the plaintiff had a contract with defendant partnership granting plaintiff the exclusive right to remove lime from the partners' land. The partners also agreed not to lease adjacent lands to the third persons for similar purposes. The partners thereafter executed a lease to defendant corporation, which removed a quantity of lime. Liability was imposed against defendant corporation, because there had been an intentional and wrongful interference with contractual relations and therefore with property rights (73 S.D. 84 at pp. 88-89).

See also: *Sorenson vs. Chevrolet Motor Co.*, 171 Minn. 260 at p. 265, 214 N.W. 754 (1927); *Nulty vs. Hart-Bradshaw Lumber & Grain Co.*, 116 Kans. 446, 227 Pac. 254 (1924); *Martens vs. Reilly*, 109 Wisc. 464, 84 N.W. 840 (1901); *Shannon vs. Gaar*, 233 Iowa 38, 6 N.W.2d 304 (1943); *Meyer vs. Washington Times Co.*, 76 F.2d 988 (C.A.D.C. 1935); 84 A.L.R. 43 et seq.; 26 A.L.R.2d 1227 et seq.

The tort of wrongful interference with a contract has been recognized by the Supreme Court of Oregon, and the necessary "malice" has been defined as

> "* * * nothing more than the intentional doing of an injurious act without justification or excuse."

DeMarais vs. *Stricker*, 152 Ore. 362 at p. 366, 53 P.2d 715 (1936).

See also: *Phez vs. Salem Fruit Union*, 103 Ore. 514 at p. 551, 201 Pac. 222, 205 Pac. 970 (1921).

It follows that the corporation is liable as a principal to a fraudulent scheme, since executed to the point of perjury, whereby it was sought to buy the property and disable the partners from performing their contract and to create a false appearance of good faith. As a result, logs were refused and none were thereafter offered except on terms destructive of Buffelen's rights in the contract. In short, the corporation sought to appropriate to itself the contract and property rights of appellee. There was no need for proof of any other or further "inducement" to fix liability. See *Meyer* vs *Washington Times Co.*, 76 F.2d 988 at p. 992 (C.A.D.C. 1935); *Inducing Breach of Contract*, by Francis B. Sayre, 36 Harvard Law Rev. 663 at pp. 678-680, 702; Prosser on Torts 986-987. In 4 Restatement of the Law of Torts, §766, Comment f, it is said:

> "There is no technical requirement as to the kind of conduct that may result in inducement . . . it may be the promise of a benefit to the third person if he will refrain from dealing with the other."

C. Erroneous assertions of appellant corporation.

(a) Contrary to appellant's assertion (Corp. Br., p. 5), damages in the amount of $50,000.00 (trebled by the trial court) for the value of timber removed by the corporation were not awarded because the corporation interfered with the cutting contract between Buffelen and the partners. The judgment for $150,000.00 was awarded solely by reason of the corporation's trespass against appellee's timber (Tr., p. 93). Damages sustained in the operation of the mill at Batterson in the amount of $118,000.00 were awarded against the corporation for interference with the contract, and for this the corporation is liable whether or not it trespassed against Buffelen's timber.

(b) It is said that the corporation did not seek out the partners (Corp. Br., pp. 6-7, 15), but that the partners sought the corporation as a purchaser. The record does not support the statement. It does show that Messrs. Buol and Carr (the corporation not yet having been organized) were present at many meetings at which the contract and Buffelen's rights were discussed. (See Br. Ans. Br. Gl., pp. 15-18). They participated in and carried out the decisions there made by denying all knowledge of the contract. As a result the partners ceased to tender logs, and the corporation refused to do so.

(c) The various assertions of the partners' good

faith (Corp. Br., pp. 15, 16) are wholly unsupported by citations to the record and were conclusively disproved by testimony revealing that the partners were advised that the contract was enforceable and that it could only be broken through the fiction of a sale to a bona fide purchaser (Tr., pp. 412-418, 431).

This is not a case of "noninducing interference." There was a careful and calculated scheme to destroy Buffelen's rights, and the corporation is liable as a principal party thereto.

II.

The trial court did not err in rendering judgment against the corporation for treble the value of timber removed by it from Buffelen's land (Appellant's Point II).

SUMMARY

A. The McKenneys did not become equitable owners of the timber by reason of the prepayment of stumpage.

B. The contract of January 8, 1948 was personal and non-assignable.

C. No interest in the land or timber passed to the corporation.

D. Buffelen had possession of the land.

E. The court properly awarded treble damages.

A. The McKenneys did not become equitable owners of the timber by reason of the prepayment of stumpage.

The contract gave the partners the right to enter and cut Buffelen's timber (Tr., p. 130). There was no promise to pay prior to or in the absence of cutting, nor did it provide that the partners should assume the fire risk. It contemplated a sale of personal property, i.e., logs, to the partners and an eventual sale of logged-off land; *it gave them no present interest in the land or the timber. It did not contemplate a sale of timber. Elliott* vs. *Bloyd*, 40 Ore. 326 at pp. 330-332, 67 Pac. 202 (1902); *Coquille M. & T. Co. vs. Robert Dollar Co.*, 132 Ore. 453 at pp. 469-470, 478, 285 Pac. 244 (1930); *Anderson vs. Moothart*, 198 Ore. 354, 256 P.2d 257 (1953); *Pope vs. Barnett*, 50 Ga. App. 199, 177 S.E. 358 (1934); *Northen vs. Tatum*, 164 Ala. 368 at pp. 372-373, 51 So. 17 (1909); *Brown vs. Comm'r. Int. Rev.*, 69 F.2d 863 at pp. 864-865 (C.C.A. 5 1934); 54 C.J.S. 730-731 (Logs and Logging, §29(c)). *Prepayment of stumpage therefore gave the partners no more than a contract credit on the purchase price of personal property thereafter to be appropriated to the contract. It could not work an equitable conversion.*

B. The contract to cut and tender logs is personal and non-assignable.

Cutting contracts are personal and non-assignable. *Polk vs. Carney*, 21 S.D. 295, 112 N.W. 147 (1907); *Putnam vs. White*, 76 Me. 551 at p. 555 (1884); *Bruley vs. Garvin*, 105 Wis. 625 at p. 629, 81 N.W. 1038 (1900); *U. S. Coal & Oil Co. vs. Harrison*, 71 W. Va. 217 at p. 219, 76 S.E. 346 (1912); 54 C.J.S. 731-732 (Logs and Logging §29(e)).

This one was non-assignable by its terms (Tr., pp. 134-135). The attempted conveyance therefore could transfer no rights held under the contract. *Smith vs. Martin*, 94 Ore. 132 at pp. 137-138, 185 Pac. 236 (1919); *Gunst vs. Myers*, 58 Ore. 522, 114 Pac. 925 (1911); *Burck vs. Taylor*, 152 U.S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578 (1894); *Behrens vs. Cloudy*, 50 Wash. 400, 97 Pac. 450 (1908); *Bonds-Foster Lumber Co. vs. Northern Pacific Railroad Co.*, 53 Wash. 302, 101 Pac. 877 (1909); *Federal National Bank vs. Commonwealth*, 282 Mass. 442 at p. 450, 185 N.E. 9 (1933). See also: *Corvallis & Alsea Railway vs. Portland E. & E. Co.*, 84 Ore. 524 at p. 538, 163 Pac. 1173 (1917); *Goodrich Silvertown Stores vs. Collins*, 167 Ore. 40 at p. 45, 115 P.2d 332 (1941).

C. No interest in the land or timber passed to the corporation.

The partners having no interest in the land standing in Buffelen's name and no assignable interest therein under the contract, they could convey none to the corporation. *They did not attempt to assign the contract to the corporation* (Tr., p. 298). *Thus the corporation's acts in no way constituted performance of or an appropriation to the contract. They were contrary to and destructive of the contract.*

The contract to sell and Buffelen's option to purchase logs were essential and related parts of a single transaction. The corporation had full knowledge of the contract and its acts were wilful and intentional (Tr., p. 88). It cut and removed timber after asserting that it had taken it free of Buffelen's rights (Tr., p. 382).

It follows that the corporation trespassed against timber in which Buffelen had the sole beneficial interest, and it is liable to Buffelen for the value of timber removed. The partners are derivatively liable.

Buffelen concedes that if its operations in the area had terminated, or if it had exercised its conditional right to log the land, it would have had to account for sums already received. However, it had bought the timber as the sole supply of logs for a mill installed at a

cost of $150,000.00 in reliance upon the contract and to supply its Tacoma mill (Tr., pp. 129, 135, 139). To relieve the corporation and the partners of liability for the trespass would validate the very fraud the contract was designed to prevent.

At the most, therefore, the partners could assert only a setoff against the judgment in the amount of stumpage previously paid for the timber taken by the corporation. There was, however, no claim for a set off in this regard, no issue was framed on it in the pretrial order, and there was no testimony of the amount of such payment. Judgment was therefore properly entered against the corporation for treble the value of timber cut and removed ($150,000.00) and against the partners for $50,000.00, being the entire amount of the loss.

D. Buffelen had possession of the land.

The reiterated assertion that Buffelen never had possession (Corp. Br., pp. 17-18, 19, 20) is contrary to the facts. *Buffelen had a man on the land at all times checking the loggers' operations* (Tr., pp. 186, 230, 289-290). Furthermore, the partners recognized this possession and attorned to it by entering and cutting pursuant to the license given them by the contract (Tr., p. 130). Even if only deemed constructive, Buffelen's possession would be sufficient to support an action for tres-

pass. *Boyer vs. Anduzia*, 90 Ore. 163 at p. 165, 175 Pac. 853 (1918).

E. The court properly awarded treble damages.

Recognizing the wilful and deliberate nature of the corporation's acts (Tr., pp. 88, 93), the trial court properly awarded treble damages (Tr., p. 96) pursuant to ORS 105.810:

> "*105.810 Treble damages for injury to or removal of produce, trees or shrubs.* Except as provided in ORS 477.310, whenever any person, without lawful authority, wilfully injures or severs from the land of another any produce thereof or cuts down, girdles or otherwise injures or carries off any tree, timber or shrub on the land of another person, * * * in an action by such person, * * * against the person committing such trespasses if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for the trespass. In any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the acts mentioned in this section, it is prima facie evidence that the acts were committed by the defendant wilfully, intentionally and without plaintiff's consent."

See *O. & C. R. Co. vs. Jackson*, 21 Ore. 360, 28 Pac. 74 (1891).

III.

There was overwhelming evidence of damage, and the court did not err in admitting Exhibits 19a, 19b, 19c and 22 establishing the amount thereof (Appellant's Points IV, V and VI).

SUMMARY

A. Evidence relating to past performance of the mill was admissible.

B. Exhibit 22 was admissible.

Appellee's basic position regarding Exhibits 19a, 19b and 19c has already been set forth (Br. Ans. Br. McK., pp. 24-28). Appellee has also discussed appellant's contentions (Corp. Br., pp. 24-25) that the mill operated on a one-shift basis and that this was the extent of the partners' obligation (Br. Ans. Br. McK., pp. 22-23; Br. Ans. Br. Gl., pp. 32-33).

A. Appellant corporation first objects that Exhibits 19a, 19b and 19c, relating to past performance of the mill, are not the best evidence, because the mill operated after October 1, 1951. The following points should be noted:

(a) No such objection was made when Exhibits 19a, 19b and 19c were offered (Tr., pp. 200-202).

(b) The evidence was conclusive that other logs were extremely difficult or impossible to get and that operation of the mill was thereby substantially reduced (Tr., pp. 220-222, 227, 464-475).

(c) Exhibits 19a, 19b and 19c were admissible to show the mill's past performance. *Exhibit 22 showed the actual operating losses sustained, which is only one part of the calculation.* Under Oregon law, the proper way to establish what the mill should have *earned* and thereby show the total amount of damages sustained by reason of the breach is to demonstrate what it earned prior to the breach. *Williams vs. Island City Milling Co.*, 25 Ore. 573, 37 Pac. 49 (1894). (See Br. Ans. Br. McK., pp. 16-17) There is no difference in this regard between a total and a partial shut down. The information is equally essential in both cases. Appellee was entitled to have the exhibits admitted, and the trial court properly received them.

(d) The purpose of the exhibits was to establish a pattern of earnings. The exhibits are attacked, however, because during certain isolated months the net profit or loss figure does not clearly relate to the quantity of logs cut in the mill during the month (Corp. Br., p. 29). It is clear, first, that such alleged inconsistencies could affect only the weight, not the admissibility of the exhibits. Secondly, the exhibits as a whole show a con-

sistent pattern of earnings after June, 1949. Furthermore, profits derive from the disposition of lumber, not from merely cutting it. Sales may be low in one month and high in another. Appellant's point is irrelevant at best.

(e) Appellant corporation's final objection to the admission of Exhibits 19a, 19b and 19c is that they are recapitulations made from books of original entry (Corp. Br., pp. 29-31). This objection, *here made for the first time,* has been discussed elsewhere (Br. Ans. Br. McK., pp. 25-28). The substance of the objection is that such summaries are not ordinarily admissible unless the primary books are first offered. No such objection was made at the trial (Tr., pp. 201-202). No motion to strike was made after it affirmatively appeared that the books were not present (Tr., p. 204). Counsel was given full opportunity to examine the witnesses regarding the exhibits and did so (Tr., pp. 203-205). The error, if any, was waived. *Employers Mutual Casualty Co. vs. Johnson,* 201 F.2d 153 (C.A. 5 1953).

B. The admission of Exhibit 22 is objected to on the grounds (a) that no foundation was laid for its admission; (b) that Mr. Gould operated the mill during part of the period to which it relates; and (c) that sufficient logs for a one-shift operation were available after January 15, 1952 (Corp. Br., pp. 31-34). None of these objections is well taken.

The statement (Corp. Br., p. 32) that there is no testimony that the exhibit accurately reflects the mill's operation is contradicted by the record, which shows that Samuel R. Miles, plaintiff's bookkeeper, was extensively examined on this very point (Tr., pp. 481-483).

The objection that Mr. Gould ran the mill during part of the period covered by the exhibit (Corp. Br., pp. 32-33) is without merit, because no damages are claimed either for lost earnings or for net operating losses during such period (Br. Ans. Br. McK., p. 19). It should be noted that Mr. Gould did not operate the mill during December, 1951 (Tr., p. 219).

The contention that sufficient logs for a one-shift operation were secured after January 15, 1952 (Corp. Br., p. 33) has been discussed elsewhere (Br. Ans. Br. McK., pp. 22-23; Br. Ans. Br. Gl., pp. 32-33; supra, p. 26), The mill opened only in April, 1952 (Tr., pp. 480, 483), and Mr. Gansberg's testimony to the contrary resulted from a misunderstanding of counsel's question (Tr., pp. 470, 474).

Counsel again attempts to show that the figures contained in the exhibit are inaccurate (Corp. Br., pp. 33-34). Sales differences are again ignored, and the particular item relied upon, fixed expenses of $20,837.76 in March, 1952, was fully explained by Mr. Miles (Tr., p. 482).

No error was committed in admitting these exhibits. Exhibits 19a, 19b and 19c disclosed the past earning record of the mill. Exhibit 22 showed the exact extent of the net losses sustained. Appellee was entitled to recover not only lost earnings, but also net losses suffered during the period. See *Wells vs. National Life Ass'n.*, 99 Fed. 222 at pp. 228-229 (C.C.A. 5 1900); Br. Ans. Br. McK., p. 19.

IV.

Appellant could not receive any interest in the timber free from Buffelen's rights therein.

SUMMARY

A. Appellant received the conveyance with knowledge of Buffelen's rights.

B. Any interest received by appellant was subject to Buffelen's right to purchase all logs cut from the land.

Appellant corporation has insisted throughout (which appellee denies) that it took equitable title to the timber by reason of the "conveyance" of August 31, 1951 (Tr., pp. 7, 17; Corp. Br., p. 18). It does not deny that it then knew of the contract and the terms thereof (Corp. Br., pp. 4-15). Buffelen had repeatedly demanded delivery of all saw and peeler logs (Tr., pp. 180-181,

183, 195-196, 206, 213, 229, 250, 251, 259-260, 309-310, 313, 339, 376).

> The court enjoined appellant corporation from "trespassing on the land or injuring or cutting timber covered by the contract * * *" (Tr., p. 95).

Even if (which appellee denies) the corporation received any interest whatever in the land or timber owned by Buffelen and standing in Buffelen's name, that interest was taken subject to Buffelen's rights, and the decree, insofar as it sustains those rights and forbids the cutting or removal of timber, must be affirmed. Furthermore, the decree must be affirmed insofar as it prevents the corporation from cutting or removing timber from the land owned or controlled by the partners and included in the contract.

In *Southwest Pipe Line Co. vs. Empire Natural Gas Co.*, 33 F.2d 248 (C.C.A. 8 1929), a contract whereby A was to purchase gas produced from certain wells owned by B was effectively enforced against B's transferee, because the transferee had received the wells with notice of A's rights. Although such transferee could not be held liable for damages for breach of the contract between A and B (see *Mound Valley Vitrafied Brick Co. vs. Mound Valley Natural Gas & Oil Co.*, 258 Fed. 936 (C.C. Kan. 1911)), the transferee took the property subject to plaintiff's rights and could be re-

strained from interfering with or injuring them. See also *Guffey vs. Smith*, 237 U.S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856 (1915); *Nordin vs. May*, 188 F.2d 411 at p. 415 (C.A. 8 1951); *Kelley vs. Central Hanover Bank & Trust Co.*, 11 Fed. Supp. 497 at pp. 509-510 (D.C. N.Y. 1935); *Meyer vs. Washington Times Co.*, 76 F.2d 988 (C.A. D.C. 1935).

The fact that this was a contract for logs rather than gas is immaterial. In the *Southwest Pipe Line* case, supra, it was argued that the decree in effect granted specific performance of a contract for the sale of personal property. Nonetheless, the court held that appellant's remedy at law for breach of contract was inadequate.

> "The action of appellant was a trespass upon appellee's rights, assuming that those rights were known to it. Equity could enjoin such interference, and, if the same worked specific performance of a contract to which appellant was not a party, that would be relief incidental to the protection of the rights granted by the contract." (33 F.2d 248 at p. 258).

The contract itself establishes the unique importance of this timber to Buffelen and its Batterson and Tacoma mills (Tr., pp. 127, 130, 135). The contract was therefore one susceptible to equitable protection. *Livesly vs. Johnston*, 45 Ore. 30 at pp. 49-50, 76 Pac. 13, 946 (1904); 152 A.L.R. 4 at pp. 14 et seq., 20 et seq. See also: *Rector*

of St. Davids vs. Wood, 24 Ore. 396, 34 Pac. 18 (1893); *Clark vs. Flint*, 39 Mass. (22 Pick.) 231 (1839).

Appellant corporation cannot avoid this result by contending that appellee was under no duty to purchase logs.

(1) Any such objection is directed solely to an asserted lack of mutuality which, it is claimed, prohibits equitable relief. It therefore relates only to the equitable nature of the relief granted and has long been waived (see Gl. Br., pp. 68-74; see discussion in Br. Ans. Br. Gl., pp. 45-46).

(2) Any right to specific performance or equitable relief dependent upon an election to take logs was perfected by Buffelen's repeated and insistent demands that all saw and peeler logs be delivered (see supra, pp. 2-10, 30-31).

The parties had treated a general demand as a proper election under the option between May 22, 1951 and September 1, 1951, during which period all saw logs were bought under a similar general instruction (see supra, p. 7). Such instruction was therefore effective without regard to any right of inspection or rejection by Buffelen. *Armstrong vs. Maryland Coal Co.*, 67 W. Va. 589, 69 S.E. 195 (1910). This practical construction of the contract is binding upon the parties (see Br. Ans. Br. Gl., pp. 42-43).

Furthermore, the option itself is binding on the purchaser with notice. An election under it is valid as against an intervening purchaser (50 A.L.R. 1314). The option had been fully exercised.

(3) Oregon law requires only mutuality of remedy for specific enforcement of contracts. *Percy vs. Miller*, 197 Ore. 230, 251 P.2d 463 (1952). Apart from the option, this contract was mutual. The loggers had many valuable and presently enforceable rights under the contract. They had the right, in the event the mill should be shut down, to take it over and operate it themselves in order to process and dispose of their logs (Tr., pp. 138-139). They were entitled to log the entire area of Buffelen's holdings and receive the loggrs' profit therefrom (Tr., p. 130). They were entitled to a conveyance of logged-off land for a nominal consideration (Tr., p. 132). In no sense of the word can it be said that the contract was not sufficiently mutual to entitle the parties to equitable protection.

(4) As it relates to the corporation, this was not a suit for specific performance, and the question of the option or the exercise thereof is irrelevant. See *Southwest Pipe Line Co. vs. Empire Natural Gas Co.*, supra, 33 F.2d 248 at p. 258 (C.C.A. 8 1929). In *Guffey vs.*

Smith, supra, 237 U.S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856 (1915), an oil lessee was granted an injunction against the operations of one holding a similar but subsequent lease from the same lessor. *The lease was terminable at any time*, and it was contended that the contract was not sufficiently mutual to support a suit for specific performance. The Supreme Court said:

> "Rightly understood, this is not a suit for specific performance. Its purpose is not to enforce an executory contract to give a lease, or even to enforce an executory promise in a lease already given, but to protect a present vested leasehold, amounting to a freehold interest, from continuing and irreparable injury calculated to accomplish its practical destruction. * * * In a practical sense the suit is one to prevent waste, and it comes with ill grace for the defendants to say that they ought not to be restrained because, perchance, the complainants may sometime exercise their option to surrender the lease * * *" (237 U.S. 101 at p. 115).

See also: *Crown Orchard Co. vs. Dennis*, 229 Fed. 652 at pp. 654-655 (C.C.A. 4 1915).

(5) Finally, the propriety of injunctive relief against one interfering with a contract to sell personal property produced from land has been specifically rec-

ognized by the Oregon Supreme Court. See *Phez Co. vs Salem Fruit Union,* 103 Ore. 514 at pp. 551-552, 201 Pac. 222, 205 Pac. 970 (1921), noted in Pomeroy on Equity Jurisprudence (5th Ed., 1941) 945 (§13.44). See also *Meyer vs. Washington Times Co.,* 76 F.2d 988 (C.A.D.C. 1935).

Therefore, any interest in the land or timber embraced in the contract and received by the corporation under the attempted conveyance of August 31, 1951 was taken subject to Buffelen's rights to have the first refusal of all logs cut from it. The decree protecting those rights must be sustained.

CONCLUSION

The record in this case, as it affects appellant corporation, is clear. The corporation was organized as a device for diverting Buffelen's timber and contract rights to the private advantage of third persons, who thereby sought to "cut themselves in" on Buffelen's holdings. This involved not only a fraudulent scheme to establish the corporation as a bona fide purchaser; it perpetuated itself in the form of false testimony at the trial and retrial of the case. The legal questions raised by appellant corporation are without merit, and in view of the record

there is no doubt of its legal or moral liability for the sums awarded against it.

The Judgment and Decree of the trial court must be affirmed.

Respectfully submitted,

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